IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10731 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE M.S.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PRIYA BLUE INDUSTRIES P. LTD.

Versus

JOINT COMMISSIONER OF INCOME TAX

Appearance:
MR JP SHAH for Petitioner
MR MIHIR JOSHI with MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.S.SHAH

Date of decision: 24/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this petition under Article 226 of the Constitution, the petitioner has prayed for a writ of

certiorari or any other appropriate writ for quashing the notice dated 29.8.2000 (Annexure "A") under Section 158 BD of the Income-tax Act, 1961 (hereinafter referred to as "the Act") issued by the Joint Commissioner of Income-tax, Special Range-2, Rajkot, the sole respondent herein.

2. The facts leading to filing of this petition, briefly stated and as averred by the petitioner, are as under :-

2.1 The petitioner is engaged in the business of ship breaking at Alang, District Bhavanagar. In the course of its regular business, the petitioner sells materials to various parties from time to time and its purchasers at times pay cash or at times by their own cheques drawn on their own bank accounts or at times the cheques are obtained from other concerned persons with whom they may have transactions. The petitioner is concerned with realization of the sale price whether the payment is made by one mode or the other. The petitioner's accounts are audited under the Income-tax Act as well as under the Companies Act. The search was initiated under Section 132 of the Act in the case of M/s Mahendra S. Shah and Hemant C. Shah and their group concerns. These persons are not in any way connected with the petitioner and the petitioner does not have dealings with them by way of sale of goods or even otherwise. The said persons (hereinafter referred to as "the raidees") are engaged in the business of finance in the name of their various concerns, but the petitioner had not received any cheque issued by them at the instance of the purchasers of materials from the petitioner or even otherwise. It is further averred by the petitioner that the raidees might have made deposits with the petitioner but such deposits are by cheque, repayment is by cheque, interest payment is by cheque. The petitioner had deducted tax from interest. It is also the case of the petitioner that the deposit, interest payment, TDS and repayments are all shown in the books of accounts of the petitioner and that the petitioner has no other dealings with the raidees. On 29.8.2000, the Joint Commissioner of Income-tax, Special Range - 2, Rajkot, the respondent herein, issued notice under section 158BC read with Section 158BD of the Act stating that on perusal of the records of search proceedings in the cases of M/s Mahendra S. Shah and Hemant C. Shah and other group cases, the respondent was satisfied that undisclosed income belongs to the petitioner also and, therefore, the petitioner is required, in pursuance of the provisions of Section 158BC(a)(ii), to furnish the return in the prescribed

form setting forth the petitioner's total income including the undisclosed income for the block period between 1.4.1989 and 7.12.99.

2.2 The petitioner has raised the following contentions in the petition :-

(i) There are no facts which entitle the respondent to issue notice under Section 158BD, the condition precedent for which is satisfaction of undisclosed income belonging to any person other than the raided person.

(ii) The authorities have not come across any books of accounts, documents or assets belonging to the petitioner which would indicate that the petitioner had any undisclosed income. The condition precedent for applying Section 158BD is not satisfied.

(iii) All the transactions such as deposits, interest payments, TDS and repayments are duly and correctly recorded in the books of accounts of the petitioner which are audited and these are the only transactions of the petitioner with the raidees.

3. In response to the notice, affidavit in reply is filed by Mr Harsh Prakash, Joint Commissioner of Income-tax, Rajkot, the respondent herein, stating as under :-

"Search and seizure action was carried out in the case of Shri Mahendra Himatlal Shah and Shri Hemant C. Shah, Bhavnagar u/s. 132 of the I.T. Act on 17.12.99. During the course of search proceedings and consequent enquiry, it was noticed that both these persons had opened bank accounts in several names and by using these bank accounts they would deposit cash received from Ship Breakers at Alang and thereafter would pay cheque against this cash to such ship breakers and in the bargain earn commission upto 1.5%. For example, cash received from ship breakers was deposited in the account of "A", "A" would transfer to the credit of account of "B". "B" again would pay to the credit of account "C" and "C" to "D" and so on. Finally the cheque would be issued by the last holder of the bank account to the ship breakers. So the above mentioned parties were carrying on the business of

converting black money into legally accounted funds for a meagre commission. It may be submitted that above mentioned parties are not assessed to tax and have never filed return of income so far. The seized materials in the case of the above mentioned parties indicate that the petitioner was involved in converting its unaccounted funds into legally accounted funds in garb of sales made/loans received by him which were not found to be genuine. The petitioner M/s Priya Blue Industries Private Limited during the financial year has deposited a sum of Rs.3,93,74,367/- in cash and received Cheques/DDs through the bank account of Shri Mahendra H. Shah in the garb of having made sales to M/s Shiv Traders, Mumbai. As also a sum of Rs.1,51,79,000/- during the F.Y. 1998-99 in the garb of having made sales to M/s.Sheetal Marketing, Ahmedabad. In these cases the transaction was found not to be genuine. During the post search enquiry and also enquiry made at Mumbai by the investigation wing revealed that M/s. Shiv Traders stated to be residing at 141, Mangal Kunj, Near SIES School, Matunga, Mumbai do not exist in such address. In fact the premises where M/s. Shiv Traders stated to be carrying out business was actually four-storey residential building with flats. The area was residential area consisting of multi-storey building and flats. 141, Mangal Kunj could not be found. Flat No. 41 contained the building Magan Kunj that was four-storey residential building and M/s. Shiv Traders could not be found here also. Similarly, it was found that genuine sales were not made to M/s Sheetal Marketing, Ahmedabad.

That from the facts stated above, it was noticed that M/s Priya Blue Industries Private Limited (the petitioner) has converted unaccounted income to the extent of Rs.5,45,53,367/- into legally accounted funds by making bogus sales to M/s Shiv Traders and M/s Sheetal Marketing and credit such funds to its books of account conveniently through bank account maintained by Shri Mahendra C. Shah. The above findings are corroborated by statement of Shri Mahendra C. Shah u/s. 132(4) of the I.T. Act wherein he has clearly admitted while answering question No. 2, 10, and 11 that he is in the business of providing cheques against

cash.

That the petitioner M/s Priya Blue Industries Private Limited, during F.Y. 1997-98 arranged loan of Rs.1,16,000/- by providing cash and obtaining cheques through bank accounts maintained by Shri Hemant C. Shah in the name of M/s M. Dineshkumar & Co. which is to be brought to tax, u/s. 68 of the I.T. Act as undisclosed income during the block period."

The respondent has further averred that prima facie on the basis of the facts gathered during the search, which is corroborated by the statement of Mr Mahendra H. Shah under Section 132(4) of the Act, the petitioner was in possession of undisclosed income during the block period. It is further stated that if the petitioner's claim regarding genuineness of the transaction will be inquired during the proceedings under Section 158BD.

4. The petitioner has filed rejoinder affidavit reiterating the ground that there is no evidence to show that the petitioner has undisclosed income. It is stated that in reality it is the case of cash credit and sales which are recorded in the books of accounts of the petitioner and are, therefore, disclosed income and could only form the subject matter of regular assessment under Section 143(3). It is further submitted in the rejoinder that the Assessing Officer of the raidees has to make the affidavit of his satisfaction and that the respondent is not the Assessing Officer of the raidees. Neither the Assessing Officer of the raidees has made any affidavit nor does the respondent's affidavit state that the Assessing Officer of the raidees was satisfied under Section 158BC. It is also contended that the notice is given for the wrong assessment years 1988-89 to 1998-99 when in law and facts it has to be for assessment years 1990-91 to 2000-2001.

5. At the hearing of the petition, Mr JP Shah, learned counsel for the petitioner has raised the following contentions :-

(i) A notice under Section 158BD can be issued only if the respondent had already seized the books of accounts or other documents belonging to the petitioner and indicating that the undisclosed income belongs to the petitioner. Since no such books of accounts or documents belonging to the

petitioner are seized, notice could not have been issued against the petitioner under Section 158BD.

(ii) The Assessing Officer of the raidees has not filed any affidavit to state that he was satisfied that any undisclosed income belonged to the petitioner. In absence of any such affidavit, the Court must proceed on the footing that the respondent herein i.e. the Assessing Officer of the petitioner issued notice under Section 158 BD without complying with the condition precedent of satisfaction of the Assessing Officer of the raidees. In view of the absence of the jurisdictional fact, the notice must fail.

(iii) The impugned notice is also bad as it covers the assessment years which are not covered by the definition of the block period as defined by section 158B(a) of the Act.

(iv) All the amounts which are involved in the entries relied upon by the respondent cannot be construed as undisclosed income as the provisions of Sections 68 and 69 cannot be applied at the time of issuance of notice under Section 158BD, but they can be applied at the time of computing of undisclosed income for the block period. Reliance is placed on the provisions of Section 158BB(2) of the Act.

(v) The proceedings under Section 158BD can be taken up only after the proceedings under Section 158BC against the raidees are completed which has not been done in the instant case.

(vi) The department has refrained from producing evidence on the basis of which it has come to an adverse conclusion against the petitioner inspite of the averments made in the petition and in the rejoinder affidavit contending that all the transactions of the petitioner with the raidees were recorded in the books of accounts of the petitioner.

6. As far as the first contention is concerned, that issue is no longer res integra, because the very same contention came to be urged in Special Civil Application No. 10396 of 2000 and by judgment dated 27.12.2000 it came to be negatived. The aforesaid case was filed by

Rushil Industries Ltd. -- (hereinafter referred to as "Rushil") another ship breaker against whom notice under Section 158BD came to be issued on the ground that Mahendra H. Shah and Hemant C. Shah were subjected to a search operation and undisclosed income prima facie belonging to Rushil came to be detected during the search proceedings. The contention urged there was that since the books of accounts and documents seized in that search operation did not belong to Rushil, notice could not have been issued against Rushil under Section 158BD. Negativing the contention, the Court observed that it was true that in a search operation against the two raidees no books of accounts or other documents or assets belonging to petitioner-Rushil were seized, but it was not correct on the part of the petitioner to contend that action under Section 158-B cannot be taken unless in the search operations against a particular person books of accounts or other documents or assets - belonging to another person showing undisclosed income of that other person are found. The Court then held in terms -

> "A bare reading of the provisions of Section 158-BD would show that for taking action under the said Section the assessing officer is merely required to be satisfied that the books of accounts or other documents or assets found in search show undisclosed income of a person other than one against whom the search was conducted. Merely because no books of accounts or documents or assets (belonging to the petitioner) were found in search against the two above named persons it cannot be said that no action for alleged undisclosed income was called for against the petitioner under Section 158-BD."
>
> (emphasis supplied)

In view of the aforesaid pronouncement of this Court, the first contention must fail.

7. As far as the second contention is concerned, Mr JP Shah for the petitioner has vehemently urged that the jurisdiction to issue notice under Section 158BD cannot be exercised without the satisfaction of the Assessing Officer of the raidees that the undisclosed income in question belonged to the petitioner. It is vehemently submitted that in absence of any affidavit of the respondent-Assessing Officer of the raidees, who is different from the Assessing Officer of the petitioner, the notice issued by the respondent must fail. When it was contended by the learned counsel for the revenue that

there was no such ground raised in the memo of the petition about absence of satisfaction of the Assessing Officer of the raidees, the learned counsel for the petitioner strongly relied on the decision of this Court in P.V. Doshi vs. Commissioner of Income-tax, Gujarat, (1978) 113 ITR 22. The learned counsel further relied on the averments and submissions made in the rejoinder affidavit which are already quoted hereinabove. The learned counsel for the petitioner also prayed for time to join the Assessing Officer of the raidees as a party respondent.

8. Having given our anxious consideration to the above contention, we are not inclined to hold that the impugned notice suffers from any jurisdictional error as alleged. The relevant portion of Section 158BD reads as under :-

> "158BD. Where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under section 132 or whose books of account or other documents or any assets were requisitioned under section 132A, then, the books of account, other documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person and the provisions of this Chapter shall apply accordingly."

Since the memo of the petition does not contain any averment about lack of satisfaction of the Assessing Officer of the raidees and since the said officer is also not joined as a party respondent, no fault can be found with the respondent (Assessing Officer for the petitioner) for not making any statement in the reply affidavit about the satisfaction of the Assessing Officer of the raidees. There is no dispute about the fact that the Assessing Officer of the raidees has handed over to the respondent (Assessing Officer of the petitioner), the books of accounts and other documents seized during the search operations under Section 132 of the Act. In the facts of the present case and the material on record there is nothing to dissuade us from invoking the presumption under Section 114 of the Indian Evidence Act, 1872 that the official act has been regularly performed in respect of the satisfaction of the assessing officer

of the raidees.

9. Moreover, as regards the contention of the learned counsel for the petitioner that satisfaction of the Assessing Officer of the raidees under Section 158BD is a jurisdictional fact and that this Court must be satisfied about such satisfaction even without any averment or challenge in the memo of the petition about any alleged lack of such satisfaction of the Assessing Officer of the raidees, the contention does not commend to us.

In Khandubhai Vasanji Desai & Ors. vs. Deputy Commissioner of Income-tax & Anr. (1999) 236 ITR 73, this Court has explained in detail the scheme of Chapter XIV-B of the Act which lays down special procedure for assessment of search cases. It is held that the reason to believe contemplated by Section 132(1) is for the purpose of issuance of a warrant or authorization which precedes the detection of the undisclosed income and it enures for the entire search and seizure of the assets, etc. irrespective of the fact whether they belong to the raided person or any other person. In other words, the competent authority empowering the raid is not directing its mind at all to ascertain whether the undisclosed income belongs to the raided person or any other person, but only wants the income or property in the possession of any person, which has not been or would not be disclosed, to be searched and seized by the authorized officer. While issuing notice under section 158BC against the raidee requiring him to file the return in the prescribed form, if at any stage the Assessing Officer is satisfied that any undisclosed income belongs to some other person, then he must forthwith issue similar notice to such other person also. It is thus clear that initiation of proceedings under Section 158BD against another person is not a separate and independent proceeding for which separate jurisdictional facts have to be established. The proceedings under Section 158BD of the Act against a person other than the raidee are a part of the proceedings which commence with the search under Section 132 of the Act and culminate into the proceedings under Chapter XIV-B of the Act including Sections 158BC and 158BD. We are, therefore, unable to accept the contention urged on behalf of the petitioner that absence of any averment on behalf of the respondent about satisfaction arrived at by the Assessing Officer of the raidees will vitiate the notice issued by the respondent - the Assessing Officer of the petitioner -under Section 158BD of the Act.

In our view, reliance placed by the learned counsel for the petitioner on the decision of this Court in P.V. Doshi (Supra) is misconceived. That was a case under Section 147 of the Act wherein the notice for reassessment was challenged. This Court held that the conditions precedent for initiating reassessment proceedings are : (1) reasonable belief reached by the Income-tax Officer under clause (a) or clause (b) of section 147; (ii) recording of reasons by the Income-tax Officer under section 148(2); (iii) sanction before issuing the notice of reassessment by the higher authorities under section 151. These three conditions have been introduced by way of safeguards in public interest so that the finally concluded proceedings, which at the time of the original assessment could be reopened through the initial procedure of appeal, revision or rectification before the assessment became final, could not be lightly reopened with the consequent hardship to the assessee and also unnecessary waste of public time and money in such proceedings. These conditions have, therefore, to be treated as being mandatory. There could never be a waiver of a mandatory provision for the simple reason that in such cases jurisdiction could not be conferred on the authority by mere consent, but only on conditions precedent for the exercise of jurisdiction being fulfilled.

The aforesaid principles laid down in the context of Sections 147 and 148 of the Act pertaining to reopening of concluded assessment proceedings are not applicable to the issuance of notice under Section 158BD of the Act which proceedings are quite different in nature and, as observed earlier, are a part of the scheme of search operations and the subsequent procedure for assessment of undisclosed income as contained in Chapter XIV-B of the Act.

10. As regards the third contention that the notice is bad because it requires the petitioner to file return for the years which are not covered by the definition of `block period' as contained in Section 158B(a) of the Act, in our opinion, it is not necessary to go into this question at this stage as it is open to the petitioner to raise all available contentions before the respondent. The respondent has also categorically stated in the reply affidavit that the contentions which may be raised by the petitioner during the proceedings under Section 158BD will be duly considered before the final order is passed and that the petitioner will also have the right to appeal before the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal in further appeal

in case any adverse order is passed and the petitioner is aggrieved by any such order.

11. As regards the fourth contention that the provisions of Sections 68 and 69 will apply only at the time of computation of undisclosed income for the block period and not at the time of issuance of notice under Section 158BD, the said contention also stands clearly answered against the petitioner by the decision of this Court in Khandubhai Vasanji Desai (Supra). As held hereinabove, the proceedings under Section 158BD are not separate and independent proceedings but they form a part of the search operations followed by the special procedure for assessment of undisclosed income as contained in Chapter XIV-B of the Act. Section 158B(b) defines `undisclosed income' as including any money ... . or thing or any income based on any entry in the books of account or other documents or transactions, where such money... ...thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act".

Since it is open to the petitioner to explain all the entries in the books of accounts seized during the raid before the respondent-Assessing Officer, it is not necessary to discuss the merits of this issue any further.

12. As regards the fifth contention that the proceedings under Section 158BD can be initiated only after the proceedings under Section 158BC are completed, this contention is also without any substance. As already stated above, in Khandubhai Vasanji Desai (Supra), this Court has examined and explained in detail the scheme of Chapter XIV-B of the Act. It is held therein that when any undisclosed income is detected and the Assessing Officer proceeds under Section 158BC to issue notice to the person in whose case search was conducted requiring him to furnish a return in the prescribed form, if at any stage the Assessing Officer is satisfied that any undisclosed income belongs to some other person, similar notice is to be issued to such other person also. It is thus clear that issuance of notice under Section 158BD to a person other than then raidee need not wait till completion of the proceedings under Section 158BC against the raidee. This last contention must also, therefore, fail.

13. Coming to the last contention, Mr JP Shah,

learned counsel for the petitioner has vehemently urged that the respondent has not produced any evidence on record on the basis of which they have purported to come to an adverse conclusion against the petitioner. It is submitted that Special Civil Application No. 10396 of 2000 filed by Rushil Industries Ltd. was dismissed by this Court after considering the facts in that case. Hence, dismissal of the said petition cannot seal the fate of the present petitioner in this case.

In this connection, we would refer to the averments made in the reply affidavit, which are already quoted hereinabove. It has been pointed out that the petitioner had deposited a sum of Rs.3,93,74,367/- in cash and received cheques/DDs through the bank account of Mahendra H. Shah in the garb of having made sales to M/s Shiv Traders, Mumbai and also a sum of Rs.1,51,79,000/in cash during F.Y. 1998-99 in the garb of having made sales to M/s Sheetal Marketing, Ahmedabad, but the post search enquiry made at Mumbai by the investigation wing revealed that M/s Shiv Traders and M/s Sheetal Marketing did not exist at the given address. Thus, the petitioner is prima facie found to have converted unaccounted income to the extent of Rs.5,45,53,367/- into legally accounted funds through the bank account maintained by Mahendra C. Shah. This is also corroborated by the statement of Mahendra C. Shah under Section 132(4) of the Act wherein he has admitted that he is in the business of providing cheques against cash. Similarly, the petitioner is found to have arranged loan of Rs.1,16,000/- by providing cash and obtaining cheques through the bank accounts maintained by Hemant C. Shah in the name of M/s M. Dineshkumar & Co.

As against the above material relied upon by the respondent, the petitioner has produced certain documents in support of their assertion that sales to M/s Shivam Traders were genuine. However, none of those documents destroy the case of the respondent that the premises described as the address of M/s Shiv Traders did not exist, nor do they even deal with the respondent's case about non-genuineness of the petitioner's transactions with Sheetal Trading and M/s M. Dineshkumar & Co.

In view of the aforesaid material on record, it cannot be said that the issuance of notice by the respondent against the petitioner under Section 158BD of the Act suffers from the vice of non-application of mind or for want of any material on record. Sufficient material has been disclosed in the reply affidavit to enable the petitioner to meet with the case against him.

14. In view of the above discussion, we find no merit in any of the contentions raised on behalf of the petitioner. The petition accordingly fails and is summarily dismissed with costs.

Notice is discharged. Ad-interim relief granted earlier stands vacated.

(J.M. Panchal, J.)(M.S. Shah, J.)

sundar/-